

ESTTA Tracking number: **ESTTA246510**

Filing date: **11/03/2008**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92047757
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Date	11/03/2008
Attachments	RegistrantsBrief.pdf (20 pages)(1888300 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Karen B. Donovan,
Petitioner

vs.

Courtney L. Bishop,
Registrant

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Cancellation No. 92047757

REGISTRANT'S BRIEF

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Description of the Record

The Petitioner's record is limited to the evidence that Petitioner submitted during her scheduled testimony period for presenting her case in chief, which ended on April 21, 2008, and which as of that date consisted solely of the following:

1. Notice of Reliance by Petitioner Upon Trademark Registration Files for Registrations 2791896 and 2701247 and Pleadings
2. Notice of Reliance by Petitioner Upon Registrant's Response to Interrogatory 1
3. Notice of Reliance by Petitioner Upon Printed Publication by Andrew Ritchie
4. Notice of Reliance by Petitioner Upon Deposition Testimony of Registrant Courtney L. Bishop [Select Pages]

Petitioner grossly violated rule 37 C.F.R. § 2.121 of the rules of Procedure in *Inter Partes* Proceedings by submitting further case-in-chief evidence and witness affidavit testimonies on August 3 and 4, 2008, at the end of Petitioner's scheduled testimony period for rebuttal, which ended on August 4, 2008. None of the evidence or witness affidavits submitted by Petitioner on August 3 and 4, 2008, was submitted in rebuttal to any evidence that was entered by Registrant during Registrant's scheduled testimony period, which is a clear violation of 37 C.F.R. § 2.121 of the rules of Procedure in *Inter Partes* Proceedings. Even more egregiously, Petitioner inexplicably violated the rules of Procedure in *Inter Partes* Proceedings by submitting on August 3 and 4, 2008, witness affidavits, including her own affidavit, without having obtained the written agreement of the Registrant to do so, which is a clear violation of rule 37 CFR § 2.123(b). Registrant has never agreed, either verbally or in writing, to permit Petitioner to submit witness affidavits in lieu of live testimony of anyone in this proceeding.

Registrant will argue below that the Petitioner's "Notices of Reliance" submitted on August 3 and 4, 2008, must be stricken from the record and given no consideration by the Board in this Cancellation Proceeding as being clearly noncomplying evidence under rule 37 CFR § 2.123(l) (Evidence not considered) of the rules of Procedure in *Inter Partes* Proceedings, and TBMP § 706 (Noncomplying Evidence).

Registrant's record consists of his US Registration files that are at issue, and the following two Notices of Reliance that were timely submitted under 37 CFR § 2.120(j)(4) and 37 CFR § 2.120(j)(5) by the Registrant on June 19, 2008, during the Registrant's scheduled period to present his case, which ended on June 20, 2008:

1. Notice of Reliance Under 37 C.F.R. § 2.120(j)(4) upon additional selected parts of the Discovery Deposition of Courtney L. Bishop.
2. Notice of Reliance Under 37 C.F.R. § 2.120(j)(5) upon Petitioner's Responses to Registrant's Requests for Admissions Nos. 2, 3, 4, 6 and 7.

Statement of the Issues

1. Petitioner totally failed to prove affirmatively, during her scheduled case in chief testimony period, that she has legal standing to petition to cancel US Registration Nos. 2,791,896 and 2,701,247, and judgment must therefore be entered in favor of Registrant, *ipso facto*.

2. Petitioner totally failed to prove that she is an heir of Marshall W. “Major” Taylor, and therefore Petitioner failed to prove, during her scheduled case in chief testimony period, that she is entitled to claim any statutory benefits under the State of Indiana Rights of Publicity Statute.

3. Petitioner totally failed to prove that Registrant fraudulently executed declarations in the registration applications that became US Registration Nos. 2,791,896 and 2,701,247.

Recitation of the Facts

1. Petitioner’s Failure to Prove Affirmatively Her Legal Standing

Petitioner’s scheduled testimony period for presenting her case in chief ended on **April 21, 2008**, without Petitioner having submitted any witness testimony, including her own, or any other evidence to prove affirmatively that Petitioner has legal standing to petition to cancel the Registrant’s US Registrations at issue herein. Registrant’s Answer to the Petitioner’s Petition for Cancellation denied each and every factual allegation therein that related in any way to Petitioner’s allegations of fact to establish legal standing in this proceeding, and Registrant has not stipulated to the Petitioner’s legal standing to petition to cancel the Registrant’s US Registrations at issue. Petitioner simply did not affirmative prove any fact relating in any way to her legal standing to bring this proceeding.

2. Petitioner's Violation of Rules 37 C.F.R. § 2.121 and 37 CFR § 2.123(b)

On **August 3 and 4, 2008**, at the very close of Petitioner's scheduled testimony period for rebuttal, Petitioner inexplicably submitted "Notices of Reliance" upon witness affidavits that (1) were clearly noncompliant evidence, as Registrant has never agreed verbally or in writing to allow Petitioner to submit witness testimonies in the form of affidavits in this proceeding, which is an explicit prerequisite under rule 37 CFR § 2.123(b); and that (2) did not rebut any of the limited evidence and testimony that had been entered by Registrant during his testimony period, which also makes the submitted evidence noncompliant as being in direct violation of the specific limitations imposed on the rebuttal period by 37 C.F.R. § 2.121. Petitioner's egregious noncompliance with the rules of 37 CFR § 2.121 is further exemplified by the fact that among the witness affidavits that Petitioner submitted at the close of her testimony period for rebuttal was the Petitioner's own witness affidavit containing case in chief testimony. Registrant was therefore never afforded the right to cross examine Petitioner on her rule-violating attempt to enter her own testimony by affidavit in this proceeding. The remainder of the Petitioner's submissions that were also made on **August 3 and 4, 2008**, during her rebuttal testimony period were also clearly case-in-chief evidence that was in no way submitted in rebuttal to Registrant's submitted evidence.

3. The Inapplicability of the Indiana Rights of Publicity Statute

Marshall W. "Major" Taylor died and was buried in 1932 in Chicago, Illinois, where he had been residing since 1930. (Registrant's Requests for Admission Nos. 6, 7) Petitioner offered absolutely no proof during her case in chief testimony period to establish that she is either a testate or intestate heir of Marshall W. "Major" Taylor who is now entitled to claim rights of publicity in his name, if any ever existed, under the Indiana Rights of Publicity Statute.

4. US Registration Nos. 2,791,896 and 2,701,247

Registrant's US Registration No. 2,791,896 at issue is for the mark MAJOR TAYLOR and Design for "retail store and/or on-line computerized ordering services featuring bicycles, bicycle equipment, bicycle clothing, shoes, and apparel; promoting bicycle sports, bicycle competitions and/or events of other(s)" in International Class 35. Registrant's US Registration No. 2,701,247 at issue is for the mark MAJOR TAYLOR and Design for "financial and insurance underwriting services pertaining to fund raising associations, foundations, charitable not for profit organizations covering activities held within the normal scope of operation for these organizations, namely, fundraisers" in International Class 36. Petitioner offered absolutely no evidence during her case in chief testimony period to prove what goods and/or services are identified by any of the alleged third party uses of the MAJOR TAYLOR trade name or trademark that underlie the Petitioner's allegations of fraudulent declarations against Registrant.

Argument

For the Petitioner to have prevailed in this cancellation proceeding, it was incumbent upon the Petitioner to have proven (1) that she possesses legal standing to challenge the continued presence on the Principal Register of the Registrant's Registrations at issue, and (2) that there is a valid ground why the Registrant is not entitled under law to maintain his Registrations. *See Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1026, 213 U.S.P.Q. 185, 187 (C.C.P.A. 1982). Petitioner has totally failed to sustain her burden of proof on either element (1) or (2).

1. Petitioner's Failure to Prove Affirmatively Her Legal Standing

A. Registrant Challenged Petitioner's Standing

Petitioner's allegations within her Petition for Cancellation do not conclusively establish her legal standing to petition to cancellation Registrant's U.S. Registrations at issue. *See Richie v. Simpson*, 170 F.3d 1092, 1095, 50 U.S.P.Q.2d 1023, 1029 (Fed. Cir. 1999) *citing Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1028, 213 U.S.P.Q. 185, 189 (C.C.P.A. 1982). Registrant's Answer to Petitioner's Petition for Cancellation unquestionably challenged each and every fact that was alleged in the Petition for Cancellation to establish Petitioner's standing. As a consequence, the alleged facts to establish her standing became a part of the Petitioner's case in chief that had to be affirmatively proved. *Id.*, *Richie*, 170 F.2d at 1095 ("If challenged, the facts alleged which establish standing are part of the petitioner's case, and, as we said in *Lipton*, must be affirmatively proved. *Lipton*, 670 F.2d at 1028.").

Petitioner failed to offer any affirmative proof of any facts to establish her standing at any time during her case in chief testimony period. Indeed, Petitioner did not testify during her testimony period for presenting her case in chief, and she offered absolutely no other evidence to affirmatively prove any of the facts she alleged in her Petition for Cancellation to establish standing to proceed at the pleading stage. The "Notices of Reliance" and numerous misnomered "Testimony for Plaintiff" evidentiary offerings submitted by Petitioner during her testimony period from **April 18, 2008, to April 21, 2008**, which in total substance amounts to just the four Notices of Reliance that are identified in the **Description of the Record**, *supra*, did not offer any evidence to affirmatively prove Petitioner's standing to challenge the Registrant's Registrations at issue.

B. Petitioner Grossly Violated Rules 37 CFR § 2.121 and 37 CFR § 2.123(b)

According to rule 37 CFR § 2.123(l) (Evidence not considered) of the rules of Procedure in *Inter Partes* Proceedings, and TBMP § 706 (Noncomplying Evidence), “Evidence not obtained and filed in compliance with the rules of practice governing inter partes proceeding before the Board will not be considered by the Board.” TBMP § 706 at p. 700-88 (citations omitted).

As recite above in the **Recitation of the Facts**, *supra*, on **August 3 and 4, 2008**, which were the last two days of Petitioner’s scheduled testimony period for rebuttal, Petitioner violated the rules of Procedure in *Inter Partes* Proceedings by submitting four (4) “Notices of Reliance” upon witness affidavits that (1) were noncompliant evidence under rule 37 CFR § 2.123(b), as Registrant had never agreed to allow Petitioner to submit any witness testimonies in this proceeding the form of affidavits; and that (2) were noncompliant evidence under rule 37 CFR § 2.121, as they were not offered in rebuttal to any of the evidence and testimony that had been entered by Registrant during his testimony period. Petitioner’s total disregard for the rules of Procedure in *Inter Partes* Proceedings is further evidenced by the fact that among the witness affidavits that Petitioner did file at the very close of her testimony period for rebuttal was the Petitioner’s own witness affidavit that contains her purported case in chief testimony for this proceeding. Petitioner thereby sought to purposefully deprive Petitioner of the right to cross examine Petitioner on the allegations of her noncompliant witness affidavit, and to cross examine all of the Petitioner’s other witnesses on the allegations of there noncompliant affidavits, all of which was done in violation of rule 37 CFR § 2.123(b).

The Board must not consider any of the evidence submitted by Petitioner on **August 3 and 4, 2008**, because it was all unquestionably noncompliant evidence under rules 37 CFR §

2.121 and 37 CFR § 2.123(b), and must therefore not be considered by the Board under rule 37 CFR § 2.123(l).

2. Petitioner Failed to Prove a Valid Ground Why Registrant Is Not Entitled Under Law to Maintain His Registrations.

A. The Inapplicability of the Indiana Rights of Publicity Statute

Petitioner has totally failed to carry her burden of proving that the Indiana Rights of Publicity Statute is a valid ground why the Registrant is not entitled under law to maintain his Registrations.

Petitioner has admitted that Marshall W. “Major” Taylor died and was buried in 1932 in Chicago, Illinois, where he had been residing since 1930. (Registrant’s Requests for Admission Nos. 6, 7) There is no evidence in the record that Marshall W. “Major” Taylor was domiciled at the date of his death in any state other than Illinois, and more specifically, there no evidence in the record that he was domiciled in Indiana.

The current Indiana Rights of Publicity statute is codified at IND. CODE ANN. §§ 32-36-1-1 to 32-36-1-20 (Burns). The Indiana Rights of Publicity statute provides that if a deceased personality has not transferred his rights of publicity by “Contract,” “License,” “Gift,” “Trust,” or “Testamentary document,” the rights of publicity will descend by “[o]peration of the laws of intestate succession applicable to the state administering the estate and property of an intestate deceased personality, regardless of whether the state recognizes the property rights set forth in the chapter.” IND. CODE ANN. §32-36-1-16 (Burns). Furthermore, if the rights of publicity of a deceased personality have not been so transferred, “the deceased personality’s rights set forth in this chapter terminate.” IND. CODE ANN. §32-36-1-19 (Burns)(emphasis added).

Even if it is assumed, for point of argument, that Marshall W. “Major” Taylor was a “personality” within the meaning of the Indiana Rights of Publicity Statute, Petitioner wholly

failed to prove during her case in chief testimony period that Marshall W. “Major” Taylor’s rights of publicity, if any exist under Indiana law (a point that Registrant does not concede), were transferred, or descended upon his death, to anyone, including Petitioner. Therefore, on Petitioner’s case in chief record, it can only be concluded that even if there were any rights of publicity under the Indiana Rights of Publicity statute that were transferrable or descendible following his death in 1932 (a legal conclusion that Registrant traverses) no transfers or descents of those rights were proved herein to have occurred under either Illinois or Indiana law, and therefore on this record, “the deceased personality’s rights set forth in this chapter terminate[d].” IND. CODE ANN. §32-36-1-19 (Burns)

Therefore, on the Petitioner’s record, the Indiana Rights of Publicity statute can not be a valid ground why the Registrant is not entitled under law to maintain his Registrations at issue, for on the Petitioner’s record, it can only be concluded that any rights of publicity in Marshall W. “Major” Taylor that may have existed the under Indiana Rights of Publicity statute upon his death in 1932 are terminated.

B. Petitioner Failed to Prove Fraud

Petitioner totally failed to prove that Registrant fraudulently executed the declarations in his registration applications that became US Registration Nos. 2,791,896 and 2,701,247. The Board has clearly stated that to prove fraud by a false declaration because of the nondisclosure of prior uses, the Petitioner must prove the following:

- (1) there was in fact another use of the same or a confusingly similar mark at the time the declaration was signed;
- (2) the other user had legal rights superior to applicant;
- (3) applicant knew that the other user had superior rights in the mark; and

(4) applicant, in failing to disclose those facts to the USPTO, intended to procure a registration to which he was not entitled.

See, e.g., Ohio State University v. Ohio University, 51 U.S.P.Q.2d 1289 (TTAB 1999); *Intellimedia Sports Inc. v. Intellimedia Corp.*, 43 U.S.P.Q.2d (TTAB 1997); *International House of Pancakes, Inc. v. Elca Corp.*, 216 U.S.P.Q. 521 (TTAB 1982)

It is clear from the foregoing elements that are necessary to prove fraud that the mere knowledge by the applicant of a prior use is wholly insufficient to prove fraud by a false declaration because of the nondisclosure of those prior uses. Yet, all that the Petitioner proved during her case-in-chief testimony period was Registrant's mere knowledge of the alleged "prior uses," and as a consequence, that is all that the Petitioner has argued in her Brief. Petitioner's fraud arguments are being based solely upon the following "prior use" evidence in Petitioner's case in chief testimony record:

- (1) Registrant had "learned" **from reading a book** (*The Extraordinary Career of a Champion Bicycle Racer* by Andrew Richie (1988)) (Bishop Dep. p. 13, line 15, to p.16, line 16); that Marshall W. "Major" Taylor had a daughter named Sydney Brown (Bishop Dep. p.19, line 11 to p.20, line 2, p. 33, line 1 to line 5) who was living when Andrew Richie's book was written (*Id.*), but that Marshall W. "Major" Taylor had died in 1932 completely estranged from his family (Bishop Dep. p.33, lines 19 to 24);
- (2) Registrant never met and never had any personal contacts with Sydney Brown (Bishop Dep. p.19, line 11 to p.20, line 5, p. 33, line 1 to line 5)
- (3) Registrant learned via an Internet search of the prior existence of a Major Taylor Foundation, in Worchester, Massachusetts, about which Registrant testified in his discovery deposition, "And from what I understood was at the time, the primary goal of

that organization was to raise money for a statue to be erected in Worcester, Massachusetts, in honor of Major Taylor” (Bishop Dep. p.28, line 13 to p. 29, line 17); and

(4) Registrant had visited the Major Taylor Velodrome in Indianapolis, Indiana, in 1990 to see a bicycle race (Bishop Dep. p.17, line 15 to p. 18, line 1).

1. There is No Factual Evidence That There Was Another Use of the Same or a Confusingly Similar Mark at the Time the Declarations Were Signed

Petitioner even totally failed to prove during her case-in-chief testimony period that Sydney Brown was still living in 2000 and 2001, when the Registrant signed and dated the declarations in the registration applications that became the Registrant’s Registrations at issue. All that Petitioner has established on the record is that in 1990 Registrant read a book by Andrew Richie (*The Extraordinary Career of a Champion Bicycle Racer*) that was published in 1988 in which the author said that Marshal W. “Major” Taylor had a daughter, Sydney Brown, who was living when the book was written. Registrant’s deposition testimony regarding his “prior knowledge” of Sydney Brown is not based upon his own personal knowledge, but is based solely only upon what he had read about Sydney Brown in the Andrew Richie’s book. Registrant was therefore not a competent witness to testify as to the truth of any facts concerning Sydney Brown, for all that Registrant knew about Sydney Brown was what he had read in the Andrew Richie book, portions of which were made of record by Petitioner under 37 CFR § 2.122(e). *See* TBMP § 704.08 at p. 700-400 (“Printed publications made of record by notice of reliance under 37 CFR § 2.122(e) are admissible and probative for only what they show on their face, not for the truth of the matters contained therein, unless a competent witness has testified to the truth of such matters.” (Emphasis added; footnote omitted)).

Furthermore, Petitioner totally failed to prove during her case in chief testimony period that Sydney Brown had been using MAJOR TAYLOR as a mark for any goods or services that would render Registrant's use of the marks MAJOR TAYLOR and Design on the Registrants goods and services recited in his Registrations at issue likely to cause confusion, mistake, or deception.

Petitioner also totally failed to prove during her case in chief testimony period, or to argue in her Brief, that the use of the trade name Major Taylor Foundation by a foundation in Worcester, Massachusetts, whose primary goal was to raise money for a statue of Major Taylor to be erected in Worcester, Massachusetts, would render Registrant's use of the marks MAJOR TAYLOR and Design on the Registrants goods and services recited in his Registrations at issue likely to cause confusion, mistake, or deception.

Likewise Petitioner totally failed to prove during her case in chief testimony period, or to argue in her Brief, that the use of the trade name Major Taylor Velodrome, by a bicycle racing venue in Indianapolis, Indiana, would render Registrant's use of the marks MAJOR TAYLOR and Design on the Registrants goods and services recited in his Registrations at issue likely to cause confusion, mistake, or deception.

2. There is No Evidence of Record That Any Other User Had Legal Rights Superior to Registrant (Applicant)

Not only did Petitioner totally fail to prove during her case-in-chief testimony period that Sydney Brown was living in 2000 and 2001, when the Registrant signed and dated the declarations in the registration applications that became the Registrant's Registrations at issue, but Petitioner totally failed to prove during her case-in-chief testimony period that Sydney Brown was a living legal descendant of Marshall W. "Major" Taylor who had any legal rights superior to Registrant. As argued above, on the Petitioner's case in chief testimony record, even

the Indiana Rights of Publicity Statute can not be a valid basis for Petitioner to claim that Marshall W. “Major” Taylor’s daughter Sydney Brown had legal rights superior to Registrant, as Petitioner’s Brief has argued, for on the Petitioner’s case in chief testimony record, it can only be concluded that any rights of publicity in Marshall W. “Major” Taylor that allegedly may have existed the under Indiana Rights of Publicity Statue are terminated by the Statute.

Petitioner also totally failed to prove during her case in chief testimony period, or to argue in her Brief, that the Major Taylor Foundation in Worchester, Massachusetts, had legal rights superior to Registrant; or that the Major Taylor Velodrome in Indianapolis, Indiana, had legal rights superior to Registrant.

**3. There is No Evidence of Record That Registrant (Applicant) Knew
That Any Other User had Superior Rights in the Mark**

Petitioner argues in her Brief that the following deposition testimony of Registrant establishes that Registrant “knew” that Marshall W. “Major” Taylor’s daughter Sydney Brown was living at the times in 2000 and 2001 when Registrant signed the declarations for the applications that became the Registrations at issue:

Q Prior to submitting that [first application] to the trademark office in October 2000, you had known from reading Mr. Richie’s book that there had been a daughter of Major Taylor, correct, Sydney Brown?

A Sure.

(Bishop Dep. p.33, line 1 to line 5)(Emphasis added)

Q You knew when you were submitting an application for registration that the name was of a person who had been a living person; correct?

A Right.

Q And you knew that that living person had had a daughter, Sydney Brown?

A Yes.

Q Did you know at the time you submitted that application [in 2000] what descendants at that point were living or were not living of Major Taylor?

A I knew that Sydney Brown was living, but I also knew that Sydney Brown - -Major Taylor died completely estranged from the family.

(Bishop Dep. p.33, line 12 to line 24)

Q Did you ... have any contact with Sydney Brown about using the name?

A No. I had never spoken with or corresponded with Sydney Brown.

Q Ever, to the present?

A Ever.

(Bishop Dep. p.19, line 21 to p. 20, line 2)

At most, this testimony of Registrant establishes that all that Registrant ever knew about Sydney Brown came from reading the Andrew Richie book, and that Registrant's testimony that he knew in 2000 that Sydney Brown was living necessarily came only from his reading of the Richie book, which had been published 12 years earlier in 1988. Registrant was therefore not a competent witness to testify to the truth of whether Sydney Brown was alive or dead in 2000. *See* TBMP § 704.08 at p. 700-400.

Nevertheless, whether Sydney Brown was alive or dead in the year 2000 is not the relevant issue in Petitioner's allegation of fraud. The relevant issue is whether Petitioner proved during her case in chief testimony period that Sydney Brown was a person with super rights in the MAJOR TAYLOR and Design marks of the Registrations at issue, and that Registrant knew of those superior rights. Petitioner offered absolutely no evidence in her case in chief testimony period to establish that Sydney Brown possessed any rights superior to Registrant's. As argued

above, on Petitioner's case in chief testimony record, all that can be concluded is that any rights that Petitioner may have claimed arose in Sydney Brown under the Indiana Rights Publicity Statute as an alleged heir of Marshall W. "Major" Taylor terminated by Statue upon his death in Chicago, Illinois, in 1932.

Not only did Registrant testify that he had learned from the Andrew Ritchie book that "Major Taylor died completely estranged from the family" (Bishop Dep. p.33, line 12 to line 24), but he also testified that he had conducted a thorough trademark search prior to filing the two applications to register the MAJOR TAYLOR and Design marks of the Registrations at issue.

Q What made you think it would be necessary to register the Major Taylor name?

A As I mentioned before, I've been involved in several businesses. I know for a fact that if you're looking to do something with a business at that time, I had learned that you -- basically I wanted to find out whom I would need to get permission from. So I spent the time and spent the money to research who owned the rights to the name. And I did an exhaustive trademark search. I think that search probably cost me a thousand dollars which at the time -- still -- is a lot of money, you know. So I did a trademark search, extensive.

Q What year was that?

A. I'd probably say that would be '99, 2000, you know, maybe as early as '98.

Q Okay.

A But in that general range.

Q 1998, 1999.

A Right.

Q I interrupted you. Go ahead.

A Did an extensive search. Not just an internet search, but I actually had a booklet produced searching anything that had “Major” or “Taylor” or anything closely related, and it came back that no one had the trademark for Major Taylor. As so while I’m looking for who owns the trademark to Major Taylor so that I could inquire as to whose permission I would need to use that trademark, it came back that no one owned the trademark to Major Taylor.

(Bishop Dep. p.30, line 23 to p. 32, line 4)

4. There is No Evidence That Registrant (Applicant) Intended to Procure a Registration to Which He Was Not Entitled

The foregoing quoted testimony taken from Respondent’s discovery deposition, all portions of which have been made of record by Petitioner and by Registrant’s Notice of Reliance under 37 C.F.R. § 2.120(j)(4), offers objective proof that Registrant did not intend to procure a Registration for MAJOR TAYLOR and Design to which he was not entitled. Petitioner totally failed to offer any evidence in her case in chief testimony period to the contrary.

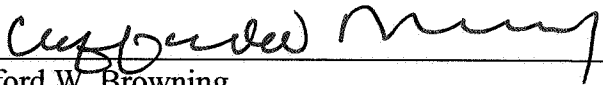
Summary

Petitioner totally failed to prove affirmatively her legal standing to bring this cancellation proceeding during her assigned case in chief testimony period, as she was obligated to do.

Registrant is entitled to judgment in his favor, *ipso facto*.

Indeed, Petitioner inexplicably did not testify at all during her assigned case in chief testimony period. Petitioner instead sought to introduce her case in chief testimony in the form of an affidavit, and the case in chief witness testimonies of other Petitioner witnesses also in the form of witness affidavits inexplicably at the very close of her assigned testimony period for rebuttal, all of which is in gross violation of the rules of Procedure in *Inter Partes* Proceedings in 37 CFR § 2.121 and 37 CFR § 2.123(b). This noncomplying evidence must not be considered by

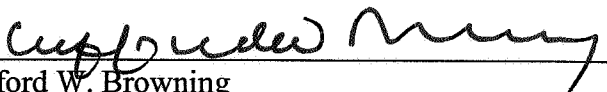
the Board. 37 CFR § 2.123(l) (Evidence not considered) and TBMP § 706 (Noncomplying Evidence). Upon the evidence that was entered by Petitioner during her assigned case in chief testimony period, Registrant has also clearly established that Petitioner failed to prove that there is a valid ground why Registrant is not entitled under law to maintain his Registrations at issue. Registrant is therefore also entitled to judgment in his favor for this reason, as well.

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CERTIFICATE OF SERVICE ON PETITIONER

The undersigned hereby certifies that a copy of the foregoing Main Brief of Registrant was served upon the following counsel of record for the Petitioner, by Federal Express, in an envelope, postage prepaid, addressed to David H.E. Bursik, 401 Hamburg Turnpike, Suite 210, Wayne, New Jersey 07470, this 3rd day of November, 2008.

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